Supreme Court, U.S.
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No. 92-426

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT LOEHR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1956(a)(3)(B), which makes it a crime to launder money represented by an undercover law enforcement or by another person at the direction of a law enforcement officer to be the proceeds of crime, is either unconstitutionally vague or applicable solely to professional money launderers.

2. Whether the district court erred in refusing to disregard the sentencing range prescribed by the Sentencing Guidelines and sentence petitioner based solely on the factors set forth in 18 U.S.C. 3553(a)(2).

3. Whether, in sentencing petitioner, the district court erred in employing Sentencing Guidelines § 2S1.1, the Guideline applicable to money laundering offenses.

4. Whether the district improperly enhanced petitioner's offense level by three points, under Sentencing Guidelines § 2S1.1(b)(1), because of his belief that the funds he laundered were the proceeds of drug trafficking.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 6a-12a) is reported at 966 F.2d 201.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1992. A petition for rehearing was denied on July 24, 1992. The petition for a writ of certiorari was filed on September 9, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted of attempting to launder money represented by an undercover law enforcement officer to be the proceeds of unlawful activity, in violation of 18 U.S.C. 1956(a)(3)(B). He was sentenced to 41 months' imprisonment, to be followed by two years of supervised release. The court of appeals affirmed. Pet. App. 6a-12a.

1. The evidence at trial showed that petitioner was a car salesman in Grand Rapids, Michigan. Credell Carpenter, a convicted drug trafficker, advised FBI Special Agent Sanford Simon that in 1986 and 1987 petitioner had sold him and his girlfriend, Chrystal Bell, vehicles knowing that they were purchased with the proceeds of drug transactions. Carpenter said that petitioner knew Carpenter was a drug dealer at the time of those transactions. Pet. App. 7a.

With the assistance of Carpenter and Bell, Simon initiated an undercover investigation to determine whether petitioner was laundering money through his employer's car dealership. The undercover investigation required that Carpenter and Bell attempt to purchase an automobile after clearly informing petitioner that the purchase price was to be paid from drug proceeds. Pet. App. 7a.

Carpenter and Bell contacted petitioner and told him they wished to buy an automobile and that the money for the purchase would come from drug proceeds. In response, petitioner agreed to sell Carpenter a car for cash without executing an IRS Form 8300 evidencing a cash transaction in excess of $10,000, and he agreed to title the vehicle in a fictitious name. Petitioner presented the sales agreement, signed by Bell in a fictitious name, to

the general manager of the dealership, who typed the information on the proper form and completed the other necessary purchase documentation. Pet. App. 7a.

On the day of the transaction, Bell arrived at the dealership with an undercover agent and gave petitioner $20,000 in cash. Petitioner accepted the money and told Bell that she could take possession of the car that day. Thereafter, Simon and another FBI agent entered the dealership and found petitioner in a room counting the money. Pet. App. 7a-8a.

2. On appeal, petitioner contended that 18 U.S.C. 1956(a)(3)(B), the statute under which he was prosecuted, is unconstitutionally vague, and that it was not intended to apply to an individual, like himself, who was not engaged in money laundering before the initiation of the undercover operation. The court of appeals disagreed, holding that "[t]he provision is clear and applies to anyone who has the requisite intent to engage in the conduct defined in the statute." Pet. App. 11a.

In challenging his sentence, peititioner also argued that the district court erred in sentencing him under Sentencing Guidelines § 2S1.1, which covers money laundering offenses, because that Guideline was adopted before the enactment of Section 1956(a)(3)(B). The court of appeals held that the district court did not err in applying Section 2S1.1 to the factual situation in this case. Pet. App. 12a.

The court of appeals also rejected petitioner's challenge to the three-level upward adjustment he received under Section 2S1.1(b)(1) of the Sentencing Guidelines, which, at the time of petitioner's offense, required such an enhancement if the defendant "knew or believed that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution

of narcotics." The court of appeals concluded that the evidence was sufficient to prove that petitioner had the necessary "knowledge or belief" that the funds for the purchase of the car were drug proceeds. Pet. App. 12a.

Finally, the court rejected without discussion petitioner's claim that the district court should have disregarded the sentencing range prescribed by the Sentencing Guidelines and sentenced him based solely on the factors enumerated in 18 U.S.C. 3553(a)(2).[1] Pet. App. 12a.

ARGUMENT

1. Petitioner renews (Pet. 17-25) his contention that Section 1956(a)(3)(B) is unconstitutionally vague and was not intended to apply to persons, like himself, who were not engaged in money laundering before the undercover operation. The court of appeals correctly rejected those claims.

The principles applicable to vagueness analysis are well established. To show that a statute is unconstitutionally vague, a criminal defendant must show that the statute in question is vague as applied to the particular conduct with which the defendant is charged. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & n.7 (1982).[2] To sustain such a vagueness attack, the defendant must show that the statute fails to give a person of ordinary intelligence

[1] The considerations enumerated in Section 3553(a)(2) include the seriousness of the offense, deterrence of criminal conduct, the protection of the public, and the rehabilitative needs of the defendant.

[2] This general rule applies outside the First Amendment context. In First Amendment cases a defendant may be able to assert a claim of vagueness based on uncertainty about the statute's application to cases not before the court. See *Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988).

reasonable notice that his conduct is forbidden. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983).

Section 1956(a)(3)(B) is not vague as to the conduct for which petitioner was convicted in this case. The statute applies to anyone who "conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity," if the defendant intends "to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity." 18 U.S.C. 1956(a)(3)(B). The statute further states that the word "represented," as used above, includes any representation made by a "person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of [the statute]." 18 U.S.C. 1956(a). Here, the evidence showed that, at the specific direction of Agent Simon, Carpenter and Bell clearly informed petitioner that they intended to use the proceeds of illegal drug transactions to purchase the automobile. See Pet. App. 7a. Accordingly, petitioner clearly had the knowledge necessary to violate the statute.

Petitioner argues (Pet. 20-21) that the statute is vague because it provides law enforcement agents with no guidance as to who should be targeted for an undercover operation. He suggests that Congress intended merely to give law enforcement officers an additional tool to pursue the types of offenders who had already been targeted by the money laundering statute, rather than to authorize them to direct undercover operations against any citizen. Putting aside the merits of that argument, petitioner is in no position to benefit from it, since Agent Simon had evidence that on two previous occasions peti-

tioner had laundered drug proceeds for Carpenter and Bell in violation of 18 U.S.C. 1956(a)(1). In any event, Congress's use of the word "whoever" in Section 1956(a)(3) clearly reflects its intent not to limit the possible targets of money laundering undercover operations in the manner petitioner suggests.

Petitioner further argues (Pet. 21-22, 25) that Section 1956(a)(3)(B) is vague because it does not address defendants who do not believe the representation that the property consists of the proceeds of unlawful activity. The plain terms of the statute refute that argument. Section 1956(a)(3)(B) requires that the defendant "believe[]" the property to be the proceeds of specified unlawful activity. As the Seventh Circuit stated in rejecting a vagueness claim with respect to another subsection of the money laundering statute, 18 U.S.C. 1956(a)(1)(B), the statute's requirements of specific intent and knowledge "'do[] much to destroy any force in the argument that application of the [statute] would be so unfair that it must be held invalid.'" *United States* v. *Jackson*, 935 F.2d 832, 839 (7th Cir. 1991), quoting *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 342 (1952).[3]

2. Petitioner contends (Pet. 14-17) that in sentencing him the district court should have disregarded the range

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[3] Petitioner's reliance (Pet. 18-19) on *Kolender* v. *Lawson*, 461 U.S. 352 (1983), is unavailing. In that case, a California statute required individuals who loiter or wander the streets to provide "credible and reliable" identification, and to account for their presence when requested by a police officer under circumstances that would justify a stop under *Terry* v. *Ohio*, 392 U.S. 1 (1968). This Court held that the statute was unconstitutionally vague by failing to clarify what it meant by "credible and reliable" identification. There is no analogous indeterminate language in Section 1956(a)(3)(B).

prescribed by the Sentencing Guidelines because it was out of keeping with the directive in 18 U.S.C. 3553(a) that the court "impose a sentence sufficient, but not greater than necessary, to comply" with the purposes of sentencing as set forth in Section 3553(a)(2). He suggests that sentencing courts may impose sentences considering only the factors set forth in that provision, without reference to the Guidelines. That argument is without merit.

Congress has made clear that sentencing courts may not disregard the Guidelines. Section 3553(a)(4) states that the sentencing court "shall" consider "the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines." Likewise, Section 3553(b) states that "[t]he court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4)."

Under Section 3553(b), "[t]he only circumstance in which the district court can disregard the mechanical dictates of the Guidelines is when it finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission [in formulating the guidelines]'." *Burns* v. *United States*, 111 S. Ct. 2182, 2184-2185 (1991). That does not mean, however, that the Guidelines may be ignored. As the Sixth Circuit concluded in *United States* v. *Davern*, 970 F.2d 1490, 1493 (1992) (en banc), "a district court must first determine a Guideline sentence, and then must consider whether there is an 'aggravating or mitigating circumstance,' that is, one not taken into account in setting the Guideline sentence." The court explained that "[u]ntil the judge has determined a sentence under

the Guidelines, it seems impossible to determine whether the mitigating or aggravating circumstance had in fact been taken into account in promulgating those specific Guidelines." *Ibid.* Although a sentencing court should consider the purposes of sentencing set forth in Section 3553(a)(2) in deciding what particular sentence to impose within the applicable Guidelines sentencing range, it "is not free to second-guess the Commission on what the range ought to be." *Davern*, 970 F.2d at 1499 (Nelson, J., concurring).

3. Petitioner contends (Pet. 13-14) that in sentencing him the district court should not have applied Sentencing Guidelines § 2S1.1, because that Guideline was promulgated before the amendment of 18 U.S.C. 1956 to cover money laundering offenses resulting from undercover operations.

Sentencing Guidelines § 1B1.2 states that the sentencing court should employ the Guideline "most applicable to the offense of conviction." Here, the district court correctly applied Guidelines § 2S1.1, since that is the only Guideline applicable to offenses involving the laundering of monetary instruments. It makes no difference that that Guideline was promulgated prior to the amendment of Section 1956 to reach the targets of undercover operations. In other contexts, the Sentencing Commission has not distinguished among defendants guilty of the same offense based on whether they were arrested as a result of an undercover investigation. Moreover, the correctness of the district court's use of Section 2S1.1 is confirmed by the fact that the Statutory Index (Appendix A) to the November 1, 1991, version of the Guidelines—which was issued after the amendment of Section 1956 to cover undercover operations—indi-

cates that Section 2S1.1 is applicable to all violations of Section 1956.

4. At the time of petitioner's offense, Guidelines § 2S1.1(b)(1) (Nov. 1, 1990) mandated a three-level enhancement "[i]f the defendant knew that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances." Petitioner contends (Pet. 8) that the district court improperly applied that provision to him. Petitioner claims that he could not have "known" that the funds were the proceeds of drug trafficking, because in fact they were government funds used in an undercover operation.

The court of appeals reasonably construed the term "knew" in the 1990 version of Guidelines § 2S1.1 to reach well-founded belief as well as certain knowledge. The court's construction was reasonable in light of the language of the 1988 version of the substantive statute, 18 U.S.C. 1956, which reached not only cases in which a defendant correctly concluded that particular funds were the products of illegal activities, but also cases in which a defendant reached that belief based on representations made in the course of an undercover investigation. Compare 18 U.S.C. 1956(a)(2)(B) (1988), with 18 U.S.C. 1956(a)(3)(B) (1988). Nothing in the Guideline or its commentary suggests an intent to treat those two closely related cases differently for purposes of the three-level enhancement required by the 1990 version of Guidelines § 2S1.1.

Petitioner points out that the decision below conflicts with the Fifth Circuit's decision in *United States* v. *Breque*, 964 F.2d 381 (1992). In *Breque*, the Fifth Circuit held that the word "knew," as used in the November 1, 1990, version of Section 2S1.1(b)(1), does not cover a de-

fendant who believes that the funds are the proceeds of drug trafficking when in truth they are not. In so holding, the court relied on a November 1, 1991, amendment to the Guideline, which changed the Guideline to read, "If the defendant knew or believed that the funds were the proceeds of an unlawful activity * * * increase by three levels."[4]

There is no need for this Court to resolve the conflict between the Fifth and Sixth Circuits. The issue presented is of little continuing importance in light of the 1991 amendment of Section 2S1.1(b)(1), which clarified the matter and left no doubt that the enhancement may be applied based on the defendant's belief that the money he laundered consisted of drug trafficking proceeds. See *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991) (because the Sentencing Commission regularly promulgates clarifying amendments on sentencing issues that divide the lower courts, the intervention of this

[4] Petitioner suggests (Pet. 8, 12) that it violated the Ex Post Facto Clause for the court of appeals to uphold the district court's interpretation of the pre-1991 Guideline. Petitioner argues that the court of appeals improperly relied on the amended Guideline in upholding his sentence, and he cites in support of that assertion the court's statement that petitioner had the "necessary knowledge or belief" that the source of the funds for the transaction was drug proceeds. Pet. App. 12a. There is no indication, however, that the court's use of the word "belief" was meant to signal that it was relying on the amended Guideline. In upholding the district court's application of Section 2S1.1, the court of appeals did not even refer to the amended version of Section 2S1.1. In short, the court of appeals, like the district court before it, construed the pre-1991 version of the Guideline rather than the amended version. The court of appeals' passing reference to the word "belief" merely indicates that the court understood the term "knew" in the 1990 version of Guidelines § 2S1.1 to encompass a belief based on an undercover agent's representations.

Court is not ordinarily needed to resolve such disputes). This Court's review of the fact-bound application of a Sentencing Guideline that is no longer in effect is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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